

## § 790.11

of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.<sup>82</sup> However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.<sup>83</sup>

### § 790.11 Contract, custom or practice in effect "at the time of such activity."

The "contract," "custom" or "practice" on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect "at the time of such activity." Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

### § 790.12 "Portion of the day."

A "preliminary" or "postliminary" activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section "only when it is engaged in during the portion of the day with respect to which it is so made compensable."<sup>84</sup> This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;<sup>85</sup> the provision is applicable only to walking, riding, traveling or other "preliminary" or "postliminary" activities of the kind described in section 4(a) of the Portal

<sup>82</sup> Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

<sup>83</sup> Senate Report, pp. 45, 49.

<sup>84</sup> Section 4(c) of the Portal Act (set out in full in § 790.3).

<sup>85</sup> See §§ 790.4-790.6.

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Act,<sup>86</sup> which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.<sup>87</sup>

### DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

### § 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that "the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation" or "any administrative practice or enforcement policy \* \* \* with respect to the class of employers to which he belonged." In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the "Administrator of the Wage and Hour Division of the Department of Labor," and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.<sup>88</sup> But where the acts or omissions complained of occurred before May 14, 1947, the employer may show

<sup>86</sup> Conference Report, pp. 12, 13.

<sup>87</sup> See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

<sup>88</sup> Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17 and 790.19.

that they were in good faith in conformity with and in reliance on “any” (written or nonwritten) administrative regulation, order, ruling, or interpretation of “any agency of the United States,” or any administrative practice or enforcement policy of “any such agency” with respect to the class of employers to which he belonged.<sup>89</sup> In all cases, however, the act or omission complained of must be both “in conformity with”<sup>90</sup> and “in reliance on”<sup>91</sup> the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be “in good faith.”<sup>92</sup> The relief from liability or punishment provided by sections 9 and 10 of the Portal Act is limited by the statute to employers who both plead and prove all the requirements of the defence.<sup>93</sup>

(b) The distinctions mentioned in paragraph (a) of this section, depending on whether the acts or omissions complained of occurred before or after May 14, 1947, may be illustrated as follows: Assume that an employer, on commencing performance of a contract with X Federal Agency extending from January 1, 1947 to January 1, 1948, received an opinion from the agency that

employees working under the contract were not covered by the Fair Labor Standards Act. Assume further that the employer may be said to have relied in good faith upon this opinion and therefore did not compensate such employees during the period of the contract in accordance with the provisions of the Act. After completion of the contract on January 1, 1948, the employees, who have learned that they are probably covered by the Act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the Act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X Agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947 to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

#### § 790.14 “In conformity with.”

(a) The “good faith” defense is not available to an employer unless the acts or omissions complained of were “in conformity with” the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied.<sup>94</sup> This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting “in conformity with” an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator

<sup>89</sup> Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, 93 Cong. Rec. 4388, 4389. See also § 790.19.

<sup>90</sup> See § 790.14.

<sup>91</sup> See § 790.16.

<sup>92</sup> See § 790.15.

<sup>93</sup> Conference Report, pp. 15, 16; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389; statements of Senators Cooper and Donnell, 93 Cong. Rec. 4372, 4451, 4452. See also the President's message of May 14, 1947, to the Congress on approval of the Act (93 Cong. Rec. 5281).

The requirements of the statute as to pleading and proof emphasize the continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the protection which Congress intended it to afford employees. See § 790.2; of. statements of Senator Wiley, 93 Cong. Rec. 4270; Senator Donnell, 93 Cong. Rec. 4452, and Representative Walter, 93 Cong. Rec. 4388, 4389.

<sup>94</sup> Statement of Senator Cooper, 93 Cong. Rec. 4451; message of the President to Congress on approval of the Act, May 14, 1947, 93 Cong. Rec. 5281.